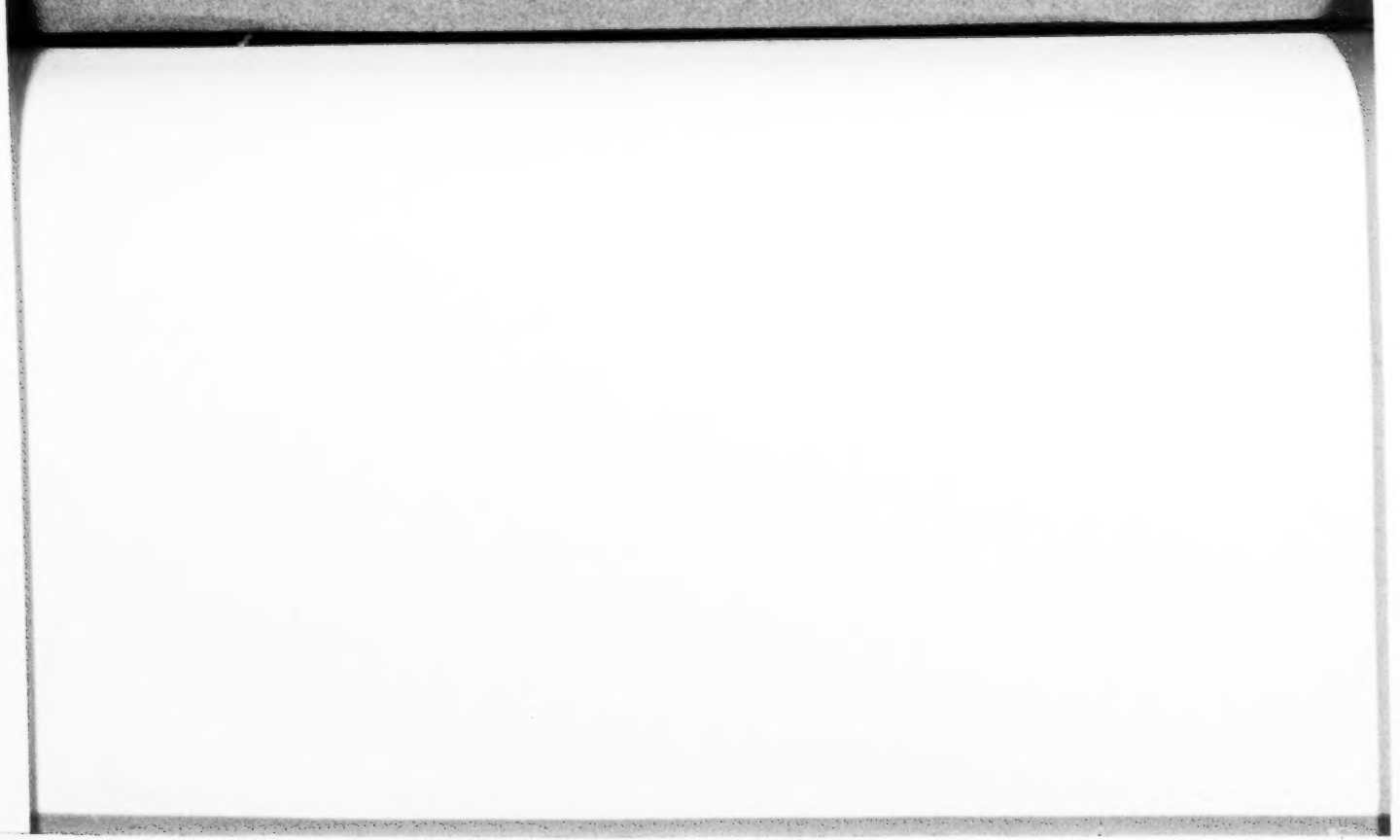

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SUPREME COURT of the UNITED STATES

October Term, 1932

No. 587

CONSOLIDATED TEXTILE CORPORATION, a corporation,

Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court for Milwaukee County,

Appellee.

Brief of Appellant in Opposition to Appellee's Motion to Dismiss or Affirm.

GEORGE B. HUDNALL,
LOUIS A. LECHER,
FRANK L. McNAMARA,
SUEL O. ARNOLD,
Counsel for Appellant.

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JOHN J. GREGORY, Judge of the Circuit Court for Milwaukee County,

Appellee.

Brief of Appellant in Opposition to Appellee's Motion to Dismiss or Affirm.

Pursuant to paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States, the appellant hereby files its brief in opposition to the appellee's motion to dismiss or affirm.

The appellee's statement against jurisdiction of the Supreme Court of the United States was served on appellant on December 20, 1932.

ISSUES INVOLVED.

There is no issue of fact presented upon this motion. It is undisputed that the appellant is a Delaware corporation, with its office and principal place of business in the City, County and State of New York; that it has no property or place of business or office or officer or agent in the State of Wisconsin; that the president of the appellant came to the State of Wisconsin for the purpose of settling the claims of the holders of bonds issued by the appellant; that service was made upon the president of the appellant while he was in the State of Wisconsin for the purpose of settling such claims.

It is also undisputed that the appellant has never conducted any business in the State of Wisconsin; that it owns all of the stock of the Consolidated Selling Company, a Delaware corporation, with its office and principal place of business in the City, County and State of New York; that the Consolidated Selling Company is not licensed to do business in the State of Wisconsin, has no property or place of business or office or officer in the State of Wisconsin, but transacts an interstate business in the State of Wisconsin by means of non-resident agents, who solicit orders in the State of Wisconsin, which are accepted at its office in New York.

Counsel for the appellee, in their brief, suggest that it is not necessarily true that the cause of action sued upon in the Circuit Court for Milwaukee County, Wisconsin, arose out of a transaction outside the State of Wisconsin. The petition for a writ of prohibition filed in the Supreme Court of the State of Wisconsin expressly alleges that the cause of action arose out of a transaction outside the State of Wisconsin (see paragraph 8 of the petition, R. 53-54), and the plaintiff's complaint filed in the Circuit Court for Milwaukee County (see Exhibit B, attached to petition for

a writ of prohibition (R. 58-60), shows upon its face that the cause of action arose outside the State. Counsel's suggestion, therefore, may be disregarded since no issue of fact in this respect is raised.

We may lay out of the case all questions relating to the timeliness of the appellant's appeal and the appellant's compliance with all applicable Federal statutes and rules of the Supreme Court of the United States governing the appellant's right to appeal. Counsel for the appellee tacitly concede that all of these requirements have been satisfied.

The appellee predicates his motion to dismiss or affirm solely on the ground that a substantial Federal question is not presented. In our brief in support of the jurisdiction of the Supreme Court of the United States, we pointed out that a substantial Federal question was presented, and cited authorities in support of our position. This brief will be confined to answering the arguments contained in the appellee's brief in opposition to jurisdiction of the Supreme Court of the United States.

ARGUMENT.

I. A State Cannot Obtain Jurisdiction Over a Foreign Corporation Unless the Corporation Actually Conducts a Continuous Course of Business in the State.

Counsel in their brief (page 5) argue that the sole test to be applied in determining whether a state may constitutionally assume jurisdiction over an unlicensed corporation is the character and power of the representative of the corporation who is served with process. They say that when any officer or agent of an unlicensed foreign corporation, acting within the authority committed to him, comes into a state for the purpose of representing a corporation,

the corporation is present and subject to the jurisdiction of the state.

The argument advanced by counsel is contrary to all of the modern decisions in this court. This court has uniformly held that a state cannot obtain jurisdiction over an unlicensed foreign corporation unless it is actually doing business in the state.

International Harvester Co. vs. Kentucky, 234 U. S. 579, 583;

Phila. & R. R. Co. vs. McKibbin, 243 U. S. 264, 265;

Rosenberg Bros. & Co. vs. Curtis Brown Co., 260 U. S. 516;

James-Dickinson Farm Mtge. Co. vs. Harry, 273 U. S. 119;

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 324-325.

Counsel cite in support of their argument, *Riverside & Dan River Cotton Mills vs. Menefee,* 237 U. S. 189. In that case, contrary to counsel's argument, the court squarely held, pages 194-195, that a state cannot obtain jurisdiction over an unlicensed foreign corporation unless it actually does business in the state.

Counsel argue that a mere isolated visit of an officer of a foreign corporation in a state in connection with corporate business constitutes the doing of business in the state by a corporation. In support of their argument, counsel cite *Commercial Mut. Acc. Co. vs. Davis,* 213 U. S. 245, and *Conn. Mut. Life Ins. Co. vs. Spratley,* 172 U. S. 602. Counsel's argument is a *petitio principii.* In each of the cases cited it was conceded that the corporation was doing business in the state (172 U. S. 602 at page 610; 213 U. S. 245, at pages 255-256).

The Supreme Court of the State of Wisconsin in adopting counsel's view (R. 107-108) frankly stated that it was "a close question" and that the rule laid down "may be truly said to be close to the line marked" by the decisions of the Supreme Court of the United States in *International Harvester Co. vs. Kentucky,* 234 U. S. 579; *Rosenberg Bros. & Co. vs. Curtis Brown Co.,* 260 U. S. 516; and *James-Dickinson Farm Mtge. Co. vs. Harry,* 273 U. S. 119. The Supreme Court of the State of Wisconsin states that the test to be applied to determine whether the state court obtained jurisdiction depended upon the character of the officer or agent upon whom service was made, and that if such officer had full power and authority to represent the corporation, the state thereby acquired jurisdiction over the corporation.

Later on in the opinion, the court specifically held that jurisdiction was obtained over a foreign corporation whenever service was obtained upon an officer who was present in the state on business for the corporation (R. 109-110).

The state court found it very difficult to reconcile its statement of the law with the decision in *Rosenberg Bros. & Co. vs. Curtis Brown Co.,* 260 U. S. 516. There the president of an Oklahoma corporation, which was engaged in the sale of merchandise at retail, made trips to New York four times a year for the purpose of purchasing merchandise. On one of these trips service was made upon him in an action brought in the courts of the State of New York. This court held that the Oklahoma corporation was not doing business in the State of New York, and that the service was invalid. The case was distinguished by the Supreme Court of the State of Wisconsin on the ground that the purchasing of merchandise did not constitute the doing of business.

The Supreme Court of the State of Wisconsin has thus laid down the rule that while the purchasing of merchan-

dise in the State of Wisconsin by an officer of a foreign corporation does not constitute the doing of business, the appearance in the State of Wisconsin of an officer of a foreign corporation for the purpose of compromising a claim against the foreign corporation does constitute the doing of business. The court in laying down this rule ignored entirely the mandate of this court in *Rosenberg Bros. & Co. vs. Curtis Brown Co.*, 260 U. S. 516, and *International Harvester Co. vs. Kentucky*, 234 U. S. 579, under which a state is prevented from obtaining jurisdiction over a foreign corporation unless such corporation is actually engaged in a continuous course of business in the state.

Counsel further argue that the decisions of this court which we have cited in support of our position are inapplicable because they are based upon a construction of the Federal statute which requires the corporation "to reside" or "be found" or to be "an inhabitant" of the district in which suit is brought, and because in some of the cases the officer was in the state in his private capacity. These facts do not at all impair the value of these cases as authority for the proposition for which they were cited, nor do the decisions cited rest upon the interpretation of a Federal statute. All of the cases specifically hold that a state may not, consistently with the due process clause of the Federal Constitution, assume jurisdiction over a foreign corporation unless it actually does business in the state. Thus, in *Riverside & Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, the question was presented to the court upon a writ of error to the Supreme Court of the State of North Carolina.

Counsel's argument is refuted by the decision of the Wisconsin Supreme Court in *Tetley, Sletten & Dahl vs. Rock Falls Mfg. Co.*, 176 Wis. 400 (a case which was not cited by the Supreme Court of the State of Wisconsin in its opinion), in which it was held (pages 403, 405-406) that

jurisdiction is not obtained over a foreign corporation unless it "is actually doing business within the state."

To the same effect:

Bagdon vs. Phil. & Reading C. I. Co., 217 N. Y. 432;

Robert Dollar Co. vs. Canadian C. & F. Co., 220 N. Y. 270;

Tauza vs. Susquehanna Coal Co., 220 N. Y. 259.

Counsel also cite *Green vs. Chicago, B. & Q. R. Co.*, 205 U. S. 530; *St. Louis S. W. R. Co. vs. Alexander*, 227 U. S. 218, and *Eastman Kodak Co. vs. Southern Photo Materials Co.*, 273 U. S. 359. These cases do not afford any comfort to the appellee. In the first case, which was an action instituted in a Federal circuit court, the question presented related to jurisdiction of a Federal circuit court. The second case, which was brought in a state court in New York and which was removed to the Federal court, squarely holds that a foreign corporation must be engaged in business in a state in order to confer jurisdiction on the state courts. In the third case, an action was instituted in the Federal court under the Sherman Act. The sole question presented was the jurisdiction of a Federal district court. The question as to deprivation of property under the due process clause of the Federal Constitution was not raised, and could not have been raised. In that case the court calls attention to the fact that the question as to the jurisdiction of a Federal court in an action brought under the Sherman Act is entirely different from that involved where an action is instituted against a foreign corporation in a state court. Furthermore, it conclusively appeared in that case that the corporation was actually engaged in conducting business in that state.

Finally, we call the court's attention to the exhaustive opinion of Hutchison, District Judge, in *Creager vs. P. F. Collier & Son Co.,* 36 Fed. (2nd) 783 (D. C. Texas), at pages 786-788. In that case all of the decisions of the Supreme Court of the United States in respect of jurisdiction of a state over a foreign corporation are cited, and a conclusion reached adverse to the contention of the appellee.

II. A State Court Cannot Obtain Jurisdiction Over an Unlicensed Foreign Corporation in a Suit Brought to Recover on a Cause of Action Arising Outside of the State.

Counsel state (page 7 of their brief) that the cases cited by the appellant to sustain its position that the state cannot obtain jurisdiction over an unlicensed foreign corporation in a suit brought to recover on a cause of action arising outside of the state, are inapplicable because they involve questions arising out of service upon an officer designated by state statutes for that purpose. Counsel has entirely misconceived the effect of these decisions. The character of the party served is wholly immaterial. The decisions uniformly hold that jurisdiction cannot be obtained over an unlicensed foreign corporation where the cause of action arose outside the state. The *ratio decidendi* is that while a foreign corporation may, by transacting business in a state, subject itself to the jurisdiction of the state, such jurisdiction does not extend to actions to recover on a cause of action arising outside the state.

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320; 325-328;

Morris & Co. vs. Skandinavia Ins. Co., 279 U. S. 405, 408-409;

Robert Mitchell Furn. Co. vs. Seldon Breck Const. Co., 257 U. S. 213, 215-216;

Pa. F. Ins. Co. vs. Gold Issue Min. & Mill. Co., 243 U. S. 93, 95-96.

Counsel cite *Barrow S. S. Co. vs. Kane,* 170 U. S. 100; *New York L. E. & W. R. Co. vs. Estill,* 147 U. S. 591; and *New England Mut. L. Ins. Co. vs. Woodworth,* 111 U. S. 138, in support of their contention. In the two latter cases the question as to whether a state may obtain jurisdiction over a foreign corporation where the cause of action arose outside the state was not presented to or passed upon by this court. In the first case an action was commenced in a Federal circuit court, and the only question presented was whether the court had jurisdiction over a cause of action arising in a foreign country. Clearly, none of these decisions are in point.

CONCLUSION.

We respectfully submit that the Supreme Court of the State of Wisconsin was in error in holding that the courts in the State of Wisconsin obtained jurisdiction over the appellant, Consolidated Textile Corporation. The decision of the Supreme Court of the State of Wisconsin deprives the appellant of its property without due process of law. A substantial Federal question is thus presented which requires the denial of the appellee's motion to dismiss or affirm.

Respectfully submitted,

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Counsel for Appellant.